IN THE SUPREME COURT OF THE UNITED STATES

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In the Matter of the Adoption of

DAVID ANDREW CABAN

A Minor under the age of Fourteen Years, by KAZIM MOHAMMED and MARIA MOHAMMED, his wife,

Appellees,

ABDIEL CABAN,

Appellant.

----------X

In the Matter of the Adoption of

DENISE CABAN

A Minor under the age of Fourteen Years, by KAZIM MOHAMMED and MARIA MOHAMMED, his wife,

Appellees,

ABDIEL CABAN,

Appellant.

----------X

CASE NO. 77-6431

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

CASE NO. 561

JURISDICTIONAL STATEMENT

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INTRODUCTION

This is an appeal from a judgment of the New York State Court of Appeals, as well as two subsequent judgments and orders of that court denying reargument, which dismisses appellant's appeal to that court from lower court orders dismissing appellant's objections to the adoption of his two children and approving their adoption by appellee, Kazim Mohammed. Appellant contends that New York State Domestic Relations Law, § 111, as it stood and was applied at the time of the adoption orders, and as it has been construed by the courts of New York, is unconstitutional on its face and as applied in authorizing the adoption of appellant's children, who he was raising, without his consent. Appellant submits this statement to show that this Court has jurisdiction of the appeal and to demonstrate that the questions presented are so substantial as to require plenary consideration of this Court.

(a) THE OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York reported as Matter of David A. C., 43 N.Y.2d 708, 401 N.Y.S.2d 208 (1977). (Appendix A) That court affirmed an order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which was reported as Matter of David Andrew C., 56 A.D.2d 627, 391 N.Y.S.2d 846. (Appendix B.) The Appellate Division affirmed orders of the Surrogate's Court, Kings County, dismissing appellant's objections and approving the adoptions. The opinion of the Surrogate's Court was not reported. A copy is appended as Exhibit C.

(b) JURISDICTION

(i)

These are two contested adoption proceedings, severally instituted by petition pursuant to Article 7 of the New York Domestic Relations Law, as it stood at the time, in the Surrogate's Court, Kings County, being the court of first instance, each to adopt a child of appellant, which were decided by the court of first instance in separate orders dismissing appellant's objections and granting the adoptions in a common opinion, despite appellant's constitutional objections, and which have been joined together and determined together, and the court of first instance being upheld by the appellate courts of the State of New York, culminating in a final judgment rendered by the highest court of New York State, where was drawn in question the validity of a statute of New York State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

(ii)

The judgment of the Court of Appeals of the State of New York, sought to be reviewed, was entered November 17, 1977, in a memorandum. Two motions for reargument and rehearing were successively denied by orders filed January 10, 1978 and February 14, 1978, in the Court of Appeals. The notice of appeal was filed on March 10, 1978 in the Surrogate's Court, Kings County

and on March 13, and March 22, 1978, in the office of the Clerk of the Court of Appeals of the State of New York, the clerks of such courts being possessed of the record.

(iii)

Jurisdiction of this appeal is confirmed by 28 U.S.C. § 1257(2) on the ground that a New York State statute, Domestic Relations Law, § 111, as it stood, was construed and applied at the time the order dismissing appellant's objections and approving adoption of his children were entered on or about September 10, 1976, was repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, but that its validity was necessarily sustained by the New York State courts in rendering the judgments on appeal.

(iv)

Cases believed to sustain jurisdiction:

Stanley v. Illinois, 405 US 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1971);

Quilloin v. Walcott, ___ US ___, 98 S.Ct. 549, 54 L.Ed.2d 511;

Zablocki v. Redhail, ___ US ___, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978);

Turco v. Monroe County Bar Association, 554 F.2d 515, (2d cir. 1977) cert.den. ___ US ___, 98 S.Ct. 122, 54 L.Ed.2d 95 (1977);

Department of Banking, State of Nebraska v. Pink, 317 US 264, 63 S.Ct. 233, 87 L.Ed. 254 (1942) reh.den. 318 US 801.

(v)

The statute involved is New York Domestic Relations Law, §111 (14 McKinney's Consolidated Laws of New York, Annotated, copyright 1964, Cumulative Annual Pocket Part for use in 1976-1977, p.51-52; McKinney's 1975 Session Laws of New York, Ch. 704, §3, p.1117), (especially subds. 2 and 3).

"§ 111. Whose consent required [Effective until Jan. 1, 1977]

Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

3. Of the mother, whether adult or infant, of a child born out of wedlock;

4. Of any person or authorized agency having lawful custody of the adoptive child.

The consent shall not be required of a parent who has abandoned the child or who has surrendered the child to an authorized agency for the purpose of adoption under the provisions of the social services law or of a parent for whose child a guardian has been appointed under the provisions of section three hundred eighty-four of the social services law or who has been deprived of civil rights or who is insane or who has been judicially declared incompetent or who is mentally retarded as defined by the mental hygiene law or who has been adjudged to be an habitual drunkard or who has been judicially deprived of the custody of the child on account of cruelty or neglect, or pursuant to a judicial finding that the child is a permanently neglected child as defined in section six hundred eleven of the family court act of the state of New York; except that notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to a parent if the judge or surrogate so

orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child. For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a finding that such parent has abandoned such child.

Where the adoptive child is over the age of eighteen years the consents specified in subdivisions two and three of this section shall not be required, and the judge or surrogate in his discretion may direct that the consent specified in subdivision four of this section shall not be required if in his opinion the moral and temporal interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe."

(c) THE QUESTIONS PRESENTED BY THE APPEAL

The case arose when, during a custody contest, still sub judice in one state court, between a father and mother of two children born out of wedlock -- appellant Abdiel Caban and appellee Maria Mohammed -- the step-father, appellee Kazim Mohammed, entered and, with the help of his wife, appellee Maria Mohammed, applied for and obtained orders of adoption on August 3, 1976, from another state court. He thus displaced the father as parent. The orders were granted without a showing or judicial finding of the father's unfitness or abandonment. One child, David Andrew Caban, was then seven

years old, and the other child, Denise Caban, was then five. At the time they were adopted, they had each spent at least half of their respective lives with their father and mother in a single de facto family unit.

The appeal presents the question of the existence of state power under the Fourteenth Amendment Due Process and Equal Protection Clauses to part the thickly knit strands uniting a fit and concerned father and his children, over the father's objection, on the basis of a state statute, N.Y. Dom. Rel. L. § 111 (specifically subds, (2) and (3)). The statute made his consent unnecessary to the adoption of his children and to the resultant rupture of his parental ties. It did so simply because (a) the children were born out of wedlock and (b) only because he is male.

The appeal for the first time brings to the Court the question of validity of N.Y. Dom. Rel. L. § 111 (2,3) under the Due Process and Equal Protection Clauses as construed and applied here to deny a fit and unwed father possessed of strong family and parental roots with his children and they with him, the right by objection to prevent their loss by adoption. This is to contrast with the facts before the Court earlier this Term (Quilloin v. Walcott, ___ US ___, 98 S.Ct. 549, 54 L.Ed.2d 511) where a different kind of father who had never had nor sought custody or responsibility for his child's care, was held for that reason to lack such rights. The appeal also poses the validity under the Equal Protection Clause of § 111 (3) authorizing a mother of children born out of wedlock to veto their own father's petition to adopt but denying the father's right to veto the mother's petition.

There is a strong trend in the United States for out of wedlock births. The Statistical Abstracts of the United

States, 1977, shows a steady rise from 3.9% in 1950 to 14.2% in 1975. Many of these children are doubtless born into de-facto families in which the father has conducted himself as a loving and responsible parent as has appellant.

(d) STATEMENT OF THE CASE; THE FACTS; HOW THE FEDERAL QUESTION IS PRESENTED.

Appellant and appellee, Maria Mohammed, are parents of two children born out of wedlock. Maria Mohammed's husband, appellee Kazim Mohammed, seeks to adopt them.

Before the children were born, appellant and appellee Maria Mohammed set up home together in Brooklyn, New York, and she took his name. They commenced a five year long relationship, living together as a de facto family, into which the children were born. At the time, appellant was separated from a previous wife with whom he had children. The trial judge accepted his testimony that he had continued to contribute to their support throughout the de facto family relationship with Maria. By the time the adoption petitions were filed, the prior marriage had terminated and appellant had remarried. He and his wife, Nina (not a party to this appeal) joined in a cross-petition for adoption. (R.49, 55) This failed for want of the mother's consent. (R.19, Appendix C, p.19).

Over the years, from their births, appellant had shouldered responsibility with respect to his children's daily supervision, education and care. He did so far more, in fact, than had their step-father, appellee Kazim Mohammed.

David Andrew Caban was seven years when adopted. He was raised for the first four and one-half years of his life in his father's home. Denise was five years old. Half

of her life was in her father's home. Both children were given their father's name at birth and his name appears on their respective birth certificates. Both children were born into, and were a part of an existing de facto family presided over by their father, appellant Abdiel Caban, and their mother, appellee Maria Mohammed (then known as Maria Caban). The parents had maintained a home together before the birth of their first child, and they shared custody of both children thereafter for a number of years. The mother left the father to live with appellee Kazim Mohammed. She took the children with her and married Mr. Mohammed. Appellant continued to see his children every weekend at his home. This lasted six to nine months. The young children were then sent away to Puerto Rico by their mother and step-father, appellee Kazim Mohammed, where they stayed without parents in their grandmother's house for some fourteen months until their father, the appellant, brought them back to live with him in Brooklyn. The children lived exclusively in appellant's care and custody thereafter for two months, from November 1975 to January 1976. During that period, the father took care of all of their needs and purchased a home to accommodate his now enlarged family. Legal custody proceedings in the Family Court resulted in a temporary custody transfer to the mother, with appellant granted weekly visitation rights pending a final hearing. The adoption proceedings by the mother and step-father, the appellees herein, were thereafter commenced in the Surrogate's Court, Kings County, and the merits hearing on custody in the Family Court adjourned pending outcome of the later-commenced adoption proceeding.

Until the adoption order broke up the de facto family ties to their father and transfered them to their step-

father, whose experience with appellant's children was relatively brief compared to their father's, their father continued regularly to exercise weekly visitation of his children at his home.

Appellant argued at trial level that the issue on his objection to the adoption was his unfitness. He contended that he was entitled, as father having extensive ties to his children and not shown to be unfit, to block the adoptions and maintain his legal parental relationship. He cited Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed2d 551 for his Fourteenth Amendment rights (R.252-3, 443-4).

The trial court ignored the argument. The hearing was presided over by a Law Assistant, Renee R. Roth, Esq. She agreed that Stanley required that appellant be allowed a hearing but professed not to know that Stanley required a hearing and determination on the issue of fitness before a father's child could be taken away. (405 U.S., 658)

The trial record contains the following exchange between Miss Roth and Mr. Bunks, who represented appellant (R.253):

"MS. ROTH: The Court has not told us a purpose of the hearing.

MR. BUNKS: You mean Stanley vs Illinois has not told you what the case is? To determine his fitness as a father.

MS. ROTH: If you will show it to me.

MR. BUNKS: I will show it to you now.

MS. ROTH: I think you ought to complete your proof.

MR. BUNKS: I have the case here.

MS. ROTH: I have read it many times, probably far more than you consider.

MR. BUNKS: Then I don't understand how you can say the question of fitness is not in this case.

MS. ROTH: Then put that in your memorandum of law.

MR. BUNKS: It is."

The hearing officer finally concluded (R.256-7):

"MS. ROTH: The purpose of this hearing is to afford the putative father with a hearing."

In his unreported opinion, the trial judge agreed that appellant "was entitled to the opportunity to be heard in opposition to the proposed step-father adoption" under Stanley (R.18) (Appendix C). But he limited the issues at the hearing so as to exclude those relating to appellant's constitutional rights to a determination of unfitness before being deprived of his children. The trial judge did not deny appellant's close relationship to the children. But, said the trial court, the purpose of the hearing was "not to determine the degree of his continued interest in the child but rather to determine the best interest of the child." The father was treated as an amicus curiae, not as one with parental rights of his own to assert.

The comment by the Hawaii Supreme Court in a similar case is apt. Willmott v. Decker, 56 Hawaii 462, 541 P.2d 13 (1975):

> "It is clear from the record * * * that the proceedings were conducted on the theory that the appellant, as the putative father of an illegitimate child, had no parental rights in and to his offspring. In this the family court was in error. Stanley v. Illinois, supra."

No misreading of Stanley v. Illinois could have been grosser than the one rendered by the trial court. This Court in Stanley held that natural fathers, like all other parents, married or not,

> "are constitutionally entitled to a hearing on fitness before their children are removed from their custody." (405 US, 658)

But, after a hearing at which his fitness was explored and not found wanting, the trial court simply dismissed his objections to the adoption, took his children away and legally supplanted him as father by a stranger, appellee Kazim Mohammed, "on the evidence". (R.24) It did not purport to apply any particular statute. There was no special need in the trial court to attack the constitutionality of a statute which did not appear to be applied.

Appellant appealed from the orders of the court of first instance to the Appellate Division, Second Department, on purely constitutional grounds under the United States Constitution. Appellant argued his Fourteenth Amendment rights under Stanley v. Illinois. That court, for the first time, in its opinion, treated the constitutionality of Domestic Relations Law, §111 to be the sole issue. Appellant had argued in that court that the statutory language did not render unnecessary to the cutting off of his parental rights a determination of a lack of fitness on his part, pursuant to Stanley v. Illinois, and that to construe it otherwise would be far-fetched and unnecessary and result in rendering it unconstitutional as applied.

The Appellate Division rejected appellant's constitutional argument. Matter of David Andrew C., 56 A.D.2d

627, 391 N.Y.S.2d 846 (1977). It construed the statute as making proof of appellant's unfitness unnecessary. It treated appellant's argument as an attack on the constitutionality of the statute as so construed and applied, upheld it constitutionality and, upon that basis, affirmed (R.463). The court's memorandum referred only to appellant's assertion of violation of Equal Protection rights. It ignored in its totality the extensive argument based on the Due Process Clause of the Fourteenth Amendment and so rejected it as well, if only sub silento. Ultimately, that court rested on Matter of Malpica-Orsini, 36 N.Y.2d 568, 370 N.Y.S.2d 511 (1975), app.dis. sub nom, Orsini v. Blasi, 423 US 1042, 96 S.Ct. 765, 46 L.Ed2d 643 (1976). The sole issue in that case was the Fourteenth Amendment validity of § 111 as there applied. (36 N.Y.2d, 569, 370 N.Y.S.2d 511) (On the state level, Malpica-Orsini had been a direct appeal to the Court of Appeals from the Family Court under New York CPLR § 5601(b)(2), which was possible of right "where the only question involved on the appeal is the validity of a statutory provision of the State or the United States under the constitution of the State or the United States.") Matter of Malpica-Orsini was thus limited to a holding on the constitutionality of § 111 under the Fourteenth Amendment. The holding in that case was that it was constitutional as applied. In resting on Malpica-Orsini, the Appellate Division thus predicated its affirmance of the trial court upon its following of the holding of Malpica-Orsini that the statute was constitutional.

Appellant thereupon appealed herein of right to the New York State Court of Appeals, the highest court of the state, pursuant to New York CPLR § 5601(b)(1). That

statute allows such an appeal "where there is directly involved the construction of the constitution of the State or the United States." He rested his appeal upon his Fourteenth Amendment rights to preserve his parental relationship absent proof of unfitness. The application and validity of § 111 having been raised first in the Appellate Division, appellant contended in the Court of Appeals that § 111, if construed to deny appellant his Stanley rights, would be unconstitutional. He argued that such an interpretation of the statute violated the accepted standards of statutory consideration. (Appellant's Brief in Court of Appeals, pp. 37-40; Appellant's Reply Brief in Court of Appeals, pp. 2-4; (See Appendix H)) cf. People v. Kaiser, 21 N.Y.2d 86, 103, 286 N.Y.S.2d 801, 815 (1967); cf. Matter of Carter v. Carter, 58 A.D.2d 438, 397 N.Y.S.2d 88 (1977))

The Court of Appeals dismissed the appeal. By necessity, it treated it as an attack on the constitutionality of the statute so construed (by citing Matter of Malpica-Orsini), so construed it, and upheld its constitutionality in the light of that construction. The court below stated: (Matter of David A. C., 43 N.Y.2d 708, 401, N.Y.S.2d 208)

> "The purportedly direct and dispositive constitutional issues underlying this appeal are no more than a restatement of questions whose merit has been clearly resolved against appellant's position. (Matter of Malpica-Orsini, 36 N.Y.2d 568, 370 N.Y.S.2d 511 (1975) app dsmd 423 US 1042), and must be held to lack the degree of substantiality necessary to sustain this appeal as of right under CPLR 5601 (sub. (b), par. (1)) * * *"

The text of CPLR 5601 sub. (b), par. (1) (2) is contained in Appendix I.

Dismissal of an appeal by the New York Court of Appeals for want of a substantial constitutional question is tantamount to a dismissal of the constitutional issues on the merits. Turco v. Monroe County Bar Association, 554 F.2d 515, 521 (2d Cir. 1977) cert. den. 98 S.Ct. 122; 54 L.Ed.2d 95 (1977); (see also Ellentuck v. Klein, F.2d (2d cir. 1/4/78 No. 77-7209))

The judgment dismissing the appeal to the Court of Appeals was filed November 17, 1977. Pursuant to Rule §500.9(b) of the Rules of the Court of Appeals of the State of New York, within thirty days after the dismissal, on November 30, 1977, by service of motion papers, appellant moved for reargument, reinstatement of the appeal, and reconsideration in the light of this Court's pending determination of Quilloin v. Walcott, No. 76-6372. (Text of Rule §500.9(b) is contained in Appendix(J). The motion was denied 1/10/78.

On the day the motion for reconsideration was denied, Quilloin v. Walcott, ___ US ___, 98 S.Ct. 549, 54 L. Ed2d 511 was decided. In view of the opinion in Quilloin, on January 19, 1978, being within thirty days of denial of his original motion, appellant moved for reargument of the denial of a rehearing, asking that the motion for reconsideration be granted, that the denial of the original motion for reconsideration, as well as the dismissal of the appeal, be vacated, the appeal be reinstated and considered in the light of Quilloin v. Walcott, the orders on appeal be reversed and the adoption proceedings be dismissed upon the ground that § 111 was unconstitutional. That motion was denied by order of the Court of Appeals filed February 14, 1978. The

same constituted the final determination of the constitutional issues presented by the highest court of the State of New York having jurisdiction thereof, and was tantamount to a holding that, upon the constitutionality of section 111, the orders of adoption were upheld.

Appellant has now exhausted all recourse under state law.

(e) THE QUESTIONS ARE SUBSTANTIAL

In Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551, this Court held the rights of natural parents, including unwed fathers, to their children as against strangers, to be among the highest ranked of all rights protected by the Fourteenth Amendment. (405 U.S., 651) Stanley made "a particularized finding that the father was an unfit parent" to be a constitutional predicate for taking his children away. Quilloin v. Walcott, ___ US ___, 98 S.Ct. 549, 54 L.Ed2d 511, 515; Stanley v. Illinois, 405 US, 657

The ruling was immediately made applicable to adoption statutes. In Rothstein v. Lutheran Social Services Wisconsin and Upper Michigan, 405 US 1051, 92 S.Ct. 1488, 31 L.Ed.2d 786 (1972), the Court held that the principles of Stanley are to be applied in weighing the validity of a state adoption statute which denied adoption rights to unwed fathers.

Several years later, in Orsini v. Blasi, 423 US 1042, 96 S.Ct. 765, 46 L.Ed.2d 631 (1976), the Court dismissed an appeal by the father of a child born out of wedlock from a New York decision (Matter of Malpica-Orsini) which upheld the constitutionality of New York Domestic Relations Law, §111. This same statute is again under attack, here, but on a very different record. The statute provided that the

consent of both parents was required for the adoption of a child born in wedlock, while the consent of the mother was required if the child was born out of wedlock. The difference between the cases lies in the sketchiness of the father's relationship to his child in Malpica-Orsini and the strongly knit ties between father and children here.

In Malpica-Orsini, the record included a stipulation in lieu of a testimonial transcript. The stipulated facts did not include that there had ever been a subsisting relationship, beyond that he was "the adjudicated putative father", between the father and his child; that the father had ever lived with the child; that he ever had or sought custody of the child; that he ever took care of the child. These are factors of critical constitutional significance. (See Quilloin v. Walcott, discussed below). The stipulation on which the father in Malpica-Orsini rested his rights, in lieu of proof of a meaningful relationship with his child, and at best for his contentions, was that he was "the adjudicated putative father"; that he has not "abandoned the child" or waived any "substantive rights he may have pursuant to statute"; that "there are no factual grounds to justify a finding that Mr. Orsini abandoned or neglected his child." It also provided that a hearing, if held, would have adduced sufficient facts "other than the abandonment or other waiver of rights by Mr. Orsini" to deny his objections and approve the adoption on the ground that the overall best interest of the child would warrant it." The stipulated facts fleshed out no real bonds at all between parent and child. Because

of the thinness and academic nature of the parent-child relationship revealed in Malpica-Orsini, it is apparent that the father there did not have at stake such a substantial interest as to warrant this Court's jurisdiction to review the constitutionality of the statute. Thus, § 111 was not ripe for review in that case. It is now.

(i)

DUE PROCESS

The necessity for an unwed father to be possessed of a substantial interest in his relationship with his children, beyond mere biological parenthood, to entitle him to Stanley protections in opposing adoption was just elucidated by this Court in Quilloin v. Walcott, ___ US ___, 98 S.Ct. 549, 54 L.Ed.2d 511

The father there had attacked the constitutionality of a Georgia statute which provided, as the New York statute has now been construed, that only the mother's consent was required for the adoption of a child born out of wedlock. He relied on the rights of parents, including unwed fathers, expressed in Stanley. The Georgia Supreme Court (238 Ga. 230), had upheld the statute, resting on Matter of Malpica-Orsini. Stanley was not disregarded. But the fact that in Stanley, "the father was a de facto member of the family unit", but not in Quilloin, was held enough to distinguish it. (238 Ga., 233-4)

On appeal, after noting probable jurisdiction, (431 US 937), the Court affirmed in a unanimous opinion by Mr. Justice Marshall. The holding rested on the unsubstantial relationship between the Georgia father and his child, which had left the paternal shoes empty in a real sense and ready to be filled by the step-father.

These factors were ruled by the Court to be dispositive. In substance, the Court held that an unwed father had to be a father in more than name only. With this as the limiting factor, whether a statute is constitutionally applied would depend on the facts at bar in each case. The Court reaffirmed Stanley v. Illinois but approached the problem of its application by noting that

> "Stanley left unresolved the degree of protection a State must afford to the rights of an unwed father, in a situation such as that presented here, in which the countervailing interests are more substantial." (54 L.Ed.2d, 515)

The "situation" in Quilloin was key to the decision. The facts were carefully scrutinized by the Court. They did not spell out a meaningful relationship of father to child. This lack took the father out of the protective mantle of Stanley.

The case at bar is quite different. To compare the facts of the two cases in the light of the standards adopted in Quilloin is clearly to illuminate the range of Stanley in protecting the rights of unwed fathers in adoption cases. Since the facts concerning appellant's relationship to his children are key to the existence of protected constitutional rights and to the substantiality of the constitutional questions, reference to them above makes a poignant contrast between the case at bar and Quilloin.

The effect of the adoption orders on appeal was to terminate appellant's parental rights. (See Matter of Anonymous (St. Christopher's Home), 40 N.Y.2d 96, 97-8 386 N.Y. S.2d 59 (1976). Nevertheless, though a solid family relationship existed between father and children, the New York courts

construed Domestic Relations Law, § 111 as authorizing their adoption by a step-father, without appellant's consent, and thus putting an end to the relationship. They overruled his objection that the statute could not allow such a result consistent with the Fourteenth Amendment absent proof of findings of unfitness by holding that it constitutionally did so. They cited Matter of Malpica-Orsini to emphasize the point and thus rested their holding upon a finding of constitutionality of the statute. As noted, Matter of Malpica-Orsini, was a case where there was a total absence of proof of a meaningful relationship between father and child such as appellant and his children enjoy here. This was of course vital to the issue as stated in Quilloin. This Court pointedly noted in Quilloin (54 L.Ed.2d, 520):

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' Smith v. Organization of Foster Families for Equality and Reform, 431 US 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring)"

Within Quilloin, appellant had a constitutionally protected relationship with his children, deserving of protection against the state statute and judicial acts which it authorized depriving him of his parentage in the absence of proof and specific finding of unfitness, under the Due Process Clause.

(ii)

EQUAL PROTECTION OF THE LAWS

Both on its face and as applied here, § 111 gives, and was construed to give, one parent of a child born out of wedlock the right to veto the other parent's adoption petition, so long as the parent being vetoed was the natural father, who had gone to Puerto Rico and brought his children back home and the parent doing the vetoing, the mother who sent them there. Only their sex was determinative. Thus, short shrift was given to appellant's cross-petitions for adoption below. (R. 47, 55) The trial court merely noted that a "putative father opposing such an adoption [by the step-father], without the consent of the natural mother, has himself no prospect of adopting the child." (R.19; Appendix C)

Section 111 gives the mother a veto over adoption by a father of his own children, despite the fact that it would not in any way threaten her maternal status, at the same time denying him a veto of her adoption. On the other hand, the statute denies a right to this fit and concerned father to veto an adoption of his children by a stranger, though the effect would be destruction of his own paternal status. Only the gender of the parent gives rise to this discriminatory classification of parents.

Another New York statute, Domestic Relations Law, § 70, provides:

> "In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly."

Accordingly, in custody disputes between the parents of children born out of wedlock, unwed father's rights have been

strictly protected and treated as equal to the mother's in New York in safeguarding the child's best interest. Matter of Hilchuk v. Grossman, 57 A.D.2d 798, 394 N.Y.S.2d 400 (1977). Where the facts indicate, an award will be made to the unwed father as against the unwed mother under § 70. Matter of Boatright v. Otero, 91 Misc.2d 653, 398 N.Y.S.2d 391 (1977). As against a non-parent, such as the maternal grandmother, an unwed natural father clearly has a superior right to custody. Raysor v. Gabbey, 57 A.D.2d 437, 395 N.Y.S.2d 290 (1977); Vanderlaan v. Vanderlaan, 405 US 1051, 92 S.Ct. 1488, 31 L.Ed. 2d 287.

Thus there was a distinct possibility that appellant may have been awarded legal custody in the children's best interest if the custody proceedings which began before and pended throughout the adoption proceedings, had instead gone to conclusion on the merits. Only in that case would § 111(4) have given appellant the right to prevent loss of his children to a stranger.

His constitutional right is made to depend not on his solid family ties but on "legal" custody. This is because of his sex. But on the other hand, the female parent is allowed to veto adoption by the father of his own children even if her legal custody is merely temporary, even if it were terminated and custody awarded to the father in the children's best interest, even if she did not possess any legal or actual custody at all. This is solely because of her sex.

The statutory distinction based on the sex of the parents is thus totally irrational. It violates both Due Process and Equal Protection. It has deprived appellant of his children and this Court should so declare its unconstitutionality.

A further discriminatory statutory classification is based on the fact that the children were born into an out of wedlock de facto family, resulting here in further violations of Equal Protection. The argument that the unwed father is entitled to the same rights as a married one had been made and rejected in Quilloin (54 L.Ed.2d, 520) only because the father there did not show the existence of a close and responsible relationship to his child deserving on balance of protection. The facts are otherwise here, as has been shown. The time has come for this Court to pronounce as applicable to adoption statutes, as here and similarly applied, the holding in Stanley v. Illinois, (405 US, 651-2):

> "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. Levy v. Louisiana, 391 US 68, 71-72 (1968). 'To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.' Glona v. American Guarantee Co., 391 US 73, 75-76 (1968)."

To have denied appellant the rights of a married father to preserve his parental ties under the facts here on the basis of the § 111 classification is to violate his rights to Equal Protection. The statute is unconstitutional as applied for that reason as well, and the Court should so hold.

Whether the classification based on sex or that based on marital status of parents is considered alone or

together with each other, it is founded on a conclusive, irrebuttable presumption which the statute makes appellant powerless to defeat, that he is somehow, because of his sex and non-marital status, less than fit as a parent. While § 70 properly provides for the absence of any presumptions "in all cases" between parents involving custody, § 111 in effect creates a conclusive presumption of unfitness of even the best of unwed fathers. It violates the Stanley precept against "presuming rather than proving * * * unfitness solely because it is more convenient to presume than prove." (405 US, 658) (See Vlandis v. Kline, 412 US 441 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973) on the violation of Due Process by a permanent unrebuttable presumption that may not be true).

The statute's discriminatory classification based exclusively on sex and marriage cuts a wide swath into one of the most precious human relationships, that of parent and child. The right of a parent to raise his own child is fundamental. Stanley v. Illinois, 405 US, 651. A statute which creates discriminatory classifications of persons who may and may not exercise a fundamental human right requires critical examination by this Court. Zablocki v. Redhail, ___ US ___, 98 S.Ct. 673, 679, 54 L.Ed.2d 618 (1978)

Zablocki dealt with an Equal Protection violation of the right to marry. The Court placed it and the right to raise one's children and maintain family relationships "on the same level" (98 S.Ct., 681, 54 L.Ed.2d,630). In language strikingly apt to the case at bar, the Court stated (98 S.Ct., 682, 54 L.Ed.2d, 631):

> "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."

The burden to uphold the classification rests, under Zablocki principles, upon appellees who are benefiting from it. There is no "sufficiently important state interest" in this case to justify tearing this father from his children. The breadth of the statute lumps together and denies rights to fit and unfit fathers of children born out of wedlock alike (but not to unfit married fathers); to fathers with deep and basic parental relationships and family ties with their children together with those who have lacked any interest at all following the act of procreation (but not with technically married but disinterested fathers). It prevents a fit father with custody and potential custody rights of his children as against a claim of the natural mother from asserting his own parental rights and vetoing their adoption by a total blood stranger, all because of his sex and lack of a legal relationship to the mother, while granting the same mother, who lacked that legal relationship with him and who is litigating the rights of custody with him in another court (and who might lose them to him), the right to veto his adoption of his own child. At the same time, it permits the mother to certify the jural relationship of the children to herself by adopting them without the father's consent, though without her consent he is barred from doing the same thing.

Section 111 has been well described by the reference in Zablocki (concurring opinion, Stevens, J., 98 S.Ct 691) to an equally wide cutting statute as

> "a statutory blunderbuss * * * * This clumsy and deliberate legislative discrimination * * * is irrational in so many ways that it cannot withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment."

Just as this Court held in Stanley that denying a hearing on fitness "to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause," (405 US, 658), so too the gender-based wedlock-based classifications in § 111 are arbitrary, invidious, irrationally discriminatory and violative of appellant's rights to Due Process and to the Equal Protection of the laws, both on its face and as applied.

CONCLUSION

By Quilloin v. Walcott, this Court has laid to rest the fears of the consequences of applying the principles of Stanley v. Illinois to all unwed fathers on a purely biological basis, and the consequent granting of veto power over adoption to fathers lacking any substantial relationship to and interest in their children. The present appeal presents the parental rights of a father who possesses a full history, relationship and interest in his children to keep them against state action that would deprive him of them, though he is not found to be unfit, solely because of his gender and his unwed status, and break up his family. Because of the soaring rates of illegitimate births, the problem affects large segments of the population. This Court should therefore note jurisdiction and give plenary consideration to the constitutional rights of fit but unmarried fathers to keep the children whom they have loved, cared for, had custody of and helped to raise, against strangers who would take their place by adoption.

Respectfully submitted this 22 day of 1978.

ROBERT H. SILK
Attorney for Appellant

Suite 1701
401 Broadway
New York, New York 10013
(212) 966-1545

In the Matter of the Adoption of DAVID A. C. (ANONYMOUS). KAZIM M. et al., Respondents; ABDIEL C., Appellant.

In the Matter of the Adoption of DENISE C. (ANONYMOUS). KAZIM M. et al., Respondents; ABDIEL C., Appellant.

Argued October 13, 1977; decided November 17, 1977

MEMORANDUM.

Appeal dismissed, with costs. The pruportedly direct and dispositive constitutional issues underlying this appeal are no more than a restatement of questions whose merit has been clearly resolved against appellant's position (Matter of Malpica-Orsini, 36 NY2d 568, app dsmd sub nom. Orsini v Blasi, 423 US 1042), and must be held to lack the degree of substantiality necessary to sustain this appeal as of right under CPLR 5601 (subd [b], par 1) (Tabankin v Codd, 40 NY2d 893; People ex rel. Uviller v Luger, 38 NY2d 854; see NY Const, art VI, § 3, subd b). Accordingly, it must be dismissed (Cohen and Karger, Powers of the New York Court of Appeals, § 55, p 254).

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur in memorandum.

Appeal dismissed.

STATE OF NEW YORK
COURT OF APPEALS,
STATE REPORTER'S OFFICE } ss.:

I, JAMES M. FLAVIN, State Reporter of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Matter of David A. C.

decided by the Court of Appeals on the 17th day of November, 19 77 with the official opinion rendered in such case, and I farther certify that the same is a true and correct copy of said opinion and of each and every part thereof.

IN WITNESS WHEREOF, I have hereunto affixed my signature as State Reporter, at the City of Albany, in the State of New York, this 13th day of March, 19 78

John T. Fitzpatrick
State Reporter of the State of New York

Attest:
L. S. Donald M. Sheraw
Clerk of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that ~~JOSEPH W. BELLACOSA~~ DONALD M. SHERAW deputy is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that ~~JAMES M. FLAVIN~~ JOHN T. FITZPATRICK is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Matter of David A. C.

decided by the said Court of Appeals on the 17th day of November, 19 77 is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of ~~JOSEPH W. BELLACOSA~~ DONALD M. SHERAW deputy, as clerk of said court, appended thereto is the true and genuine signature of said ~~JOSEPH W. BELLACOSA~~ DONALD M. SHERAW, and the signature of ~~JAMES M. FLAVIN~~ JOHN T. FITZPATRICK, as State Reporter, appended thereto is the true and genuine signature of said ~~JAMES M. FLAVIN~~ JOHN T. FITZPATRICK.

IN WITNESS WHEREOF, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall in the City of Albany and State of New York on the ..... day of ..... in the year one thousand nine hundred and .....

Chief Judge of the Court of Appeals of the State of New York

181 E
181 AE
182 E
182 AE

In the Matter of David Andrew C. (anonymous).

Kazim M. (anonymous) et al., respondents; Abdiel C. (anonymous), appellant.

In the Matter of Denise C. (anonymous).

Kazim M. (anonymous) et al., respondents; Abdiel C. (anonymous), appellant.

Danzig, Bunks & Silk, New York, N.Y. (Robert H. Silk and Abe Bunks of counsel), for appellant.

Morris Schulslaper, Brooklyn, N.Y., for respondents.

In two adoption proceedings, the putative father of the children appeals from four orders of the Surrogate's Court, Kings County, all dated September 10, 1976, and made after a hearing, two of which, inter alia, dismissed his objections to the respective adoptions and two of which approved the respective adoptions.

Orders affirmed, with one bill of costs to respondents.

Appellant contends that section 111 of the Domestic Relations Law is unconstitutional insofar as it denies to the putative father of a child born out of wedlock the same rights as to the approval of a proposed adoption as are enjoyed by the child's mother and by the father of a child born in wedlock. That very claim was found to be without merit in Matter of Malpica-Orsini (36 NY2d 568, app. dsmd. sub nom. Orsini v Blasi, 423 US 1042).

RABIN, Acting P.J., SHAPIRO, TITONE and O'CONNOR, JJ., concur.

February 22, 1977 — IN RE C., DAVID and DENISE (ANONYMOUS). M., KAZIM (ANONYMOUS); C., ABDIEL (ANONYMOUS). — 181 E, 181 AE, 182 E, 182 AE

A

B

Appendix C has not been refilmed. It is the Opinion of the Surrogate's Court which can be found at Page 27 of the Appendix.

Remittitur

Court of Appeals
State of New York

The Hon. Charles D. Breitel, Chief Judge, Presiding

2 No. 561

In the Matter of
David Andrew C. (Anonymous).
Kazim (Anonymous) &ano.,
Respondents.
Abdiel C. (Anonymous),
Appellant.

In the Matter of
Denise C. (Anonymous).
Kazim (Anonymous), &ano.,
Respondents.
Abdiel C. (Anonymous),
Appellant.

The appellant(s) in the above entitled appeal appeared by Danzig, Bunks & Silk;

the respondent(s) appeared by Morris Schulslaper.

The Court, after due deliberation, orders and adjudges that the appeal is dismissed, with costs, in a memorandum.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Surrogate's Court, Kings County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Joseph W. Bellacosa

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 17, 1977.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth *day of* January *A. D. 1978*

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

Mo. No. 1148
In the Matter of
the Adoption of David Andrew
C. (Anonymous), a Minor &c.,
by Kazim (Anonymous) et al.,
Respondents,
Abdiel C. (Anonymous),
Appellant.

In the Matter of the Adoption
of Denise C. (Anonymous), a
Minor &c., by Kazim (Anonymous)
et al.,
Respondents,
Abdiel C. (Anonymous),
Appellant.

A motion for reargument in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

E

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth *day of* February *A. D. 1978*

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

Mo. No. 111
In the Matter of
the Adoption of David Andrew
C. (Anonymous), a Minor &c.,
by Kazim (Anonymous) et al.,
Respondents,
Abdiel C. (Anonymous),
Appellant.

In the Matter of the Adoption
of Denise C. (Anonymous), a
Minor &c., by Kazim (Anonymous)
et al.,
Respondents,
Abdiel C. (Anonymous),
Appellant.

A motion for reargument in the above cause having heretofore been made upon the part of the appellant and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

F

STATE OF NEW YORK
COURT OF APPEALS

----------X

In the Matter of the Adoption of

DAVID ANDREW CABAN

A Minor under the age of Fourteen Years, by KAZIM MOHAMMED and MARIA MOHAMMED, his wife,

Appellees,

ABDIEL CABAN,

Appellant.

----------X No. 561

In the Matter of the Adoption of

DENISE CABAN

A Minor under the age of Fourteen Years, by KAZIM MOHAMMED and MARIA MOHAMMED, his wife,

Appellees,

ABDIEL CABAN,

Appellant.

----------X

Notice is hereby given that ABDIEL CABAN, the Appellant above-named hereby appeals to the Supreme Court of the United States from the final Judgment and Order of the Court of Appeals of the State of New York entered February 14, 1978, wherein that court denied Appellant's motion for reargument of the Judgment and Order of said Court of Appeals entered January 10,

G

1978, wherein that court denied Appellant's motion for reargument of the Judgment and Order of said Court of Appeals entered November 17, 1977, which Judgment and Order dismissed Appellant's appeal from the Order of the Appellate Division of the Supreme Court, Second Department, entered on or about February 22, 1977, which Order of the Appellate Division affirmed two Orders of the Surrogate's Court, Kings County, each entered on or about the 10th day of September, 1976, dismissing Appellant's objections to the adoption and approving the adoption of DAVID ANDREW CABAN, and which Order of the Appellate Division also affirmed two Orders of the Surrogate's Court, Kings County each entered on or about the 10th day of September, 1976, dismissing Appellant's objections tothe adoption and approving the adoption of DENISE CABAN; Appellant also appeals to the Supreme Court of the United States from the Judgment and Order of said Court of Appeals entered January 10th, 1978, wherein that court denied Appellant's motion for reargument of the said Judgment and Order of said Court of Appeals entered November 17, 1977; Appellant also appeals from the said initial Judgment and Order of said Court of Appeals entered November 17, 1977.

This appeal is taken pursuant to 28 USC Sect. 1257 (2).

PLEASE TAKE NOTICE that the Clerk of the Court of Appeals of the State of New York and the Clerk of the Surrogate's Court, Kings County, are each requested, pursuant to Rule 12 of the Rules of the Supreme Court of the United States, to certify the entire record and to provide for its transmission to the Clerk

of the Supreme Court of the United States.

Dated: New York, New York
March 9, 1978

Yours, etc.

ROBERT H. SILK
Attorney for Appellant.
Abdiel Caban

OFFICE & P.O. ADDRESS
401 Broadway
New York, New York 10013
(212) 966 1545

TO:

MORRIS SCHULSLAPER, ESQ.
Attorney for Appellees
16 Court Street
Brooklyn, New York 11201

CLERK NEW YORK STATE COURT OF APPEALS [filed 3/13/78, 3/22/78]

CLERK SURROGATE'S COURT, KINGS COUNTY [filed 3/10/78]

does not now, and despite the Appellate Division memorandum to the contrary, never did, challenge the Constitutionality of that statute. His claim to his children rests in the substantive natural rights of parents guaranteed by the 14th Amendment Due Process and Equal Protection clauses. Stanley v. Illinois, 405 U.S. 645; Matter of Bennett v. Jeffreys, 40 N.Y.2d 543.

The reach of Malpica-Orsini should not be construed to extend beyond its purpose, which was to uphold the Constitutionality of §111, in order to find that it impairs a basic substantive Constitutional right of parents expressed by the Supreme Court in Stanley v. Illinois. This is especially clear in the light of this Court's later decision, Matter of Bennett v. Jeffreys, 40 N.Y.2d 543. It was there held that Stanley lays down the "existing constitutional principles" in this area which the Courts of this State must observe. 40 N.Y.2d 545-6. In Matter of Goldman, 41 N.Y.2d 894, it has just been held that the Constitutional principles of Matter of Bennett apply to the construction of §111. Those principles as noted, come from Stanley.

It is often stated that adoption is a statutory matter. That is only to say that the right to adopt is of statutory origin and is strictly subject to legisla-

FROM APPELLANT'S BRIEF
COURT OF APPEALS

H

tively imposed conditions. But the right to keep one's own children is of Constitutional origin. Statutory adoptions are thus subject to parents' Constitutional rights, as expounded in Stanley v. Illinois, (see Matter of Goldman, 41 N.Y.2d 894; Rothstein v. Lutheran Social Services, 405 U.S. 1051).

The statute which simply gives rights to certain unfit mothers and married fathers beyond those found in the 14th Amendment would have to be construed as encroaching upon the existing substantive rights of fit unwed fathers, per Stanley v. Illinois, if the order below is to be affirmed. In fact, §111 does not provide that a child can be taken from a fit unwed father without his consent. The Court would have to read those words into it. It would require a strained interpretation to allow it that effect and render it unconstitutional thereby.

While this Court as obiter dictum in Malpica-Orsini, 36 N.Y.2d 570, did say that "the statute is explicit that no consent is required of the father of a child born out of wedlock," (citing Matter of Brousal, 66 Misc.2d 711, 712), this was not necessary to its holding that the statute was Constitutional. In fact, §111 does not directly refer to unwed fathers. The Surrogate's Court in Brousal had reasoned only on that basis that it

did not apply to them. As this Court stated, it does not. Appellant derives no right from it. He does not have to. While the statute does not apply, the Constitution does. That is the rock upon which Appellant rests.

It is hornbook that a legislative purpose to impair substantive 14th Amendment rights of parents will not be presumed. Most certainly is this true where such a purpose is clearly not compelled by the statutory language beyond a reasonable doubt (cf. Matter of Malpica-Orsini, 36 N.Y.2d 568, 570). This is one of the most fundamental canons of statutory construction (cf. People v. Finkelstein, 9 N.Y.2d 342, 345; Matter of James M.G., 86 Misc.2d 960).

The Constitution thus lays down the minimum standards that must be met to strip a father of a child born in or out of wedlock of his children and supplant him with another. This includes proof of his unfitness or other extraordinary circumstances elaborated in Stanley and Bennett. More than the minimum is granted to married fathers. No Constitutional barrier exists to this selective boon. As shown, it has been done by §111. But what the Courts below have done is to disregard the basic minimum Constitutional standards and displant Appellant as a father without a showing or finding of unfitness or

other extraordinary circumstance. This they are prohibited from doing by the Constitution. §111 is no magic lance by which to pierce the Constitutional shield and destroy protected parental rights.

POINT III.

APPROVAL OF ADOPTION BY THE MOTHER BUT DENIAL OF IT BY THE FATHER IS INVIDIOUS, DISCRIMINATORY, AND UNCONSTITUTIONAL.

The Courts below granted Petitioner Maria Mohammed's petition for adoption of her own children but gave short-shrift to their father's cross-petition. This violated his Constitutional right to equal protection of the laws. cf. Stanley v. Illinois, 405 U.S., 658.

If approval of the adoption by the stepfather, with its resultant termination of parental rights belonging to the natural father is held unlawful, then the natural father and natural mother should be left in the same jural relationship to their mutual children. Stanley taught that Court decisions which discriminate between parents on the basis of sex in this area violate the 14th Amendment, as well as do those that discriminate on the basis whether the children were born in wedlock. (405 U.S., 652, 658).

FROM APPELLANT'S BRIEF
COURT OF APPEALS

It should be noted that nowhere in their brief have Respondents pointed to any proof in the record or any finding below that Appellant was less than a fit and concerned father who has always loved and cared for his children -- the love being reciprocated by them -- to the extent permitted by the circumstances. More simply, to quote from Stanley v. Illinois, 405 U.S. 645, 655, "nothing in this record indicates that [Appellant] is or has been a neglectful father who has not cared for his children." Respondents' brief in effect confesses the lack of such proof or finding (Respondents' Brief, p.12).

But Respondents come back to Matter of Malpica-Orsini and that case concerns itself exclusively with the Constitutionality of Section 111. That statute in no way impairs any Constitutional right. For that reason, the United States Supreme Court dismissed the appeal (423 U.S. 1042).

At most, Section 111 requires that the supporting papers and proof include the consent of the father of children born in wedlock and of a mother to their adoption. To say that this is equivalent to permitting the father of a child born out of wedlock to be replaced by a stranger without a hearing on his own fitness is

FROM APPELLANT'S REPLY BRIEF
COURT OF APPEALS

NOTE: PAGINATION IS CORRECT.

to stretch and distort the statutory language so as to bring the legislation into conflict with the Fourteenth Amendment. It has not to this stage of the litigation been Appellant's position that the statute deserves such interpretation under the cannons of legislative construction.

However, should this Court find that Section 111 has that effect, the statute so construed could not then be squared with the Fourteenth Amendment and the Court should so declare. But nothing in Malpica-Orsini requires such a view of Section 111. For in that case, the natural father had conceded that the evidence would warrant the adoption and it could be decreed if the statute were Constitutional. He thereby forfeited the issue of his own fitness.

Clearly, the Court will not have to reach that point. By no reasonable process can a statute be stretched beyond its own plain words in order to encompass an Unconstitutional intent. The legislative branch, having enacted a Constitutional law, would have done so at peril of subsequent judicial gloss rendering the act invalid. Needless to say, that is not the way our system of separation of powers functions. Apparently recognizing this, Respondents would have this Court

drag an innocently framed statute through the mire of an Unconstitutional interpretation, and then proclaim it to be clean as it emerges from the bath.

As has been stated above, if the omission of a statutory right to notice to a father of children born out of wedlock and of his right to a hearing constituted a legislative negation of such rights, the statute would have been Unconstitutional for that reason alone. But in Malpica-Orsini, this Court found that the statutory omission did not negate the Constitutional right; that effect would be given to the latter without invalidating the legislation. Just as the Constitutional right to notice and to a hearing have been safeguarded despite legislative silence, so too has the Constitutionally mandated issue for the hearing -- the father's fitness -- been preserved. Appellant's rights have been transgressed by the Courts below, and not by any legislative act.

POINT II.

THE MERE GIVING OF NOTICE AND A RIGHT TO BE HEARD TO A FATHER OF A CHILD BORN OUT OF WEDLOCK IS NOT A COMPLETE FULFILLMENT OF THE CONSTITUTIONAL REQUIREMENT.

It has been pointed out both in this brief

Appendix I New York CPLR Section 5601, and Appendix J Rules of the New York Court of Appeals, Section 500.9 have not been filmed.

Appendix K Order of the Surrogate's Court dismissing Appellant's Objection and approving the adoption of David Andrew Caban can be found at Page 37 of the Appendix.

Appendix L Order of the Surrogate's Court dismissing Appellant's Objection and approving the adoption of Denise Caban can be found at Page 34 of the Appendix.

ADDITIONAL ORDER APPEALED FROM
(DAVID ANDREW CABAN)

14

FORM 306 2M 8-74 [illegible] 285

At a Surrogate's Court held in and for the County of Kings, City and State of New York in the Civic Center in said County, on the day SEP 10 1976 , 19

Present, Hon. NATHAN R. SOBEL, Surrogate

IN THE MATTER OF THE ADOPTION OF

DAVID ANDREW CABAN

a minor under the age of fourteen years

by KAZIM MOHAMMED and MARIA MOHAMMED, his wife

File No. 20007 19 76

Order Approving Adoption.

On the petition of KAZIM MOHAMMED and MARIA MOHAMMED, his wife, adult s, duly verified the 13th day of January 1976, and duly reverified before me the day of SEP 10 1976, 19, and the affidavits of [illegible] and MORRIS SCHULSLAPER, ESQ.

duly sworn to before me the day of SEP 10 1976, 19 76 and the above named parties having severally appeared before me together with DAVID ANDREW CABAN, a minor under the age of fourteen years, and said parties constituting all the parties required to appear before me pursuant to the provisions of an Act relating to the domestic relations, constituting chapter fourteen of the Consolidated Laws, as amended, and said parties having been examined by me, as required by said law, and said parties having presented to me an instrument containing substantially the consents required by said law, an agreement on the part of the adoptive parents to adopt and treat the minor as their own lawful child, and a statement of the date and place of birth of the person to be adopted, as nearly as the same can be ascertained, the religious faith of the parents and of the child, the manner in which the adoptive parents obtained the child, and said instrument having been duly signed, verified and acknowledged as required by law by each person whose consent is necessary to the adoption.

M

M

ADDITIONAL ORDER APPEALED FROM (DAVID ANDREW CABAN)

and Narcissus Frett, having been specifically designated by me to make an investigation to verify the truth of the allegations set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding and such other facts relating to the said infant

DAVID ANDREW CABAN and to the adoptive parents as would give me full knowledge as to the desirability of approving said adoption, and the said investigator,

Narcissus Frett, having made her report in writing dated 5/28, 1976 and the same having been filed in this Court; and said investigator having reported that the facts and conditions as set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding are true and are fairly stated, and further reporting that in her opinion the adoption of said minor DAVID ANDREW CABAN, as prayed for in the petition herein would be for the best interests of said minor;

And it appearing to my satisfaction that the moral and temporal interests of the said minor DAVID ANDREW CABAN will be promoted by granting the petition of said KAZIM MOHAMMED and MARIA MOHAMMED, his wife, and approving the proposed adoption; and it appearing to my satisfaction that there is no reasonable objection to the change of name proposed, DAVID ANDREW MOHAMMED

NOW, ON MOTION OF MORRIS SCHULSLAPER, ESQ. Attorney for the petitioners herein, it is

ORDERED, that the petition of KAZIM MOHAMMED and MARIA MOHAMMED, his wife, for the adoption of said minor born on the 16th day of July, 1969 in New York, New York be and the same hereby is granted and that such adoption and the agreement therefor submitted upon this application be and the same hereby are in all respects approved and it is

FURTHER ORDERED, that the minor, DAVID ANDREW CABAN, shall be henceforth regarded and treated in all respects as the child of said KAZIM MOHAMMED and MARIA MOHAMMED his wife, and be known and called by the name of DAVID ANDREW MOHAMMED

Surrogate.

-15-

ADDITIONAL ORDER APPEALED FROM (DENISE CABAN)

FORM 309 2M 8-74 (388)

At a Surrogate's Court held in and for the County of Kings, City and State of New York in the Civic Center in said County, on the day SEP 10 1976, 19

Present, Hon. NATHAN R. SOBEL, Surrogate

IN THE MATTER OF THE ADOPTION OF

DENISE CABAN

a minor under the age of fourteen years

by KAZIM MOHAMMED and MARIA MOHAMMED, his wife

File No. 20006 1976

Order Approving Adoption.

On the petition of KAZIM MOHAMMED and MARIA MOHAMMED, his wife, adult s, duly verified the 13th day of January, 1976, and duly reverified before me the day of SEP 10 1976, 19, and the affidavits of ~~MARIA MOHAMMED and~~ MORRIS SCHULSLAPER, ESQ.

duly sworn to before me the day of SEP 10 1976, 19 76 and the above named parties having severally appeared before me together with DENISE CABAN, a minor under the age of fourteen years, and said parties constituting all the parties required to appear before me pursuant to the provisions of an Act relating to the domestic relations, constituting chapter fourteen of the Consolidated Laws, as amended, and said parties having been examined by me, as required by said law, and said parties having presented to me an instrument containing substantially the consents required by said law, an agreement on the part of the adoptive parents to adopt and treat the minor as their own lawful child, and a statement of the date and place of birth of the person to be adopted, as nearly as the same can be ascertained, the religious faith of the parents and of the child, the manner in which the adoptive parents obtained the child, and said instrument having been duly signed, verified and acknowledged as required by law by each person whose consent is necessary to the adoption.

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ADDITIONAL ORDER APPEALED FROM (DENISE CABAN)

and Narcissus Frett , having been specifically designated by me to make an investigation to verify the truth of the allegations set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding and such other facts relating to the said infant

DENISE CABAN and to the adoptive parents as would give me full knowledge as to the desirability of approving said adoption, and the said investigator, Narcissus Frett , having made her report in writing dated 5/28, 1976. and the same having been filed in this Court; and said investigator having reported that the facts and conditions as set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding are true and are fairly stated, and further reporting that in her opinion the adoption of said minor DENISE CABAN , as prayed for in the petition herein would be for the best interests of said minor;

And it appearing to my satisfaction that the moral and temporal interests of the minor DENISE CABAN will be promoted by granting the petition of said KAZIM MOHAMMED and MARIA MOHAMMED , his wife, and approving the proposed adoption; and it appearing to my satisfaction that there is no reasonable objection to the change of name proposed,

NOW, ON MOTION OF MORRIS SCHULSLAPER, ESQ. Attorney for the petitioners herein, it is

ORDERED, that the petition of KAZIM MOHAMMED and MARIA MOHAMMED , his wife, for the adoption of said minor born on the 12th day of March, 1971 in Brooklyn, New York be and the same hereby is granted and that such adoption and the agreement therefor submitted upon this application be and the same hereby are in all respects approved and it is

FURTHER ORDERED, that the minor, DENISE CABAN , shall be henceforth regarded and treated in all respects as the child of said KAZIM MOHAMMED and MARIA MOHAMMED his wife, and be known and called by the name of DENISE MOHAMMED

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Surrogate.

jm

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 22, 1977.

HON. SAMUEL RABIN, Acting Presiding Justice,
HON. J. IRWIN SHAPIRO,
HON. VITO J. TITONE,
HON. FRANK D. O'CONNOR. } Associate Justices

In the Matter of David Andrew C. (anonymous).

Kazim M. (anonymous) et al.,

Respondents;

Abdiel C. (anonymous),

Appellant.

Order on Appeals from Orders.

In the Matter of Denise C. (anonymous).

Kazim M. (anonymous) et al.,

Respondents;

Abdiel C. (anonymous),

Appellant.

In the above entitled causes, the above named Abdiel C. (anonymous), putative father and respondent in the court below, having appealed to this court from four orders of the Surrogate's Court, Kings County, all dated September 10, 1976, and made after a hearing, two of which, inter alia, dismissed his objections to the respective adoptions and two of which approved the respective adoptions; and the said appeals having been argued by Robert H. Silk, Esq., of counsel for the appellant and argued by Morris Schulslaper, Esq., of counsel for the respondents, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the orders appealed from are hereby unanimously affirmed, with one bill of costs to respondents.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division.